

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of the Cable)	
Television Consumer Protection)	
and Competition Act of 1992)	
)	CS Docket No. 01-290
Development of Competition and Diversity)	
in Video Programming Distribution:)	
Section 628(c)(5) of the Communications Act:)	
)	
Sunset of Exclusive Contract Prohibition)	

REPLY COMMENTS OF iN DEMAND

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iN DEMAND L.L.C. (“iN DEMAND”) hereby submits its reply comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding (“Notice”).

I. THE COMMENTS DEMONSTRATE THAT THE MVPD MARKETPLACE, AND PARTICULARLY THE PAY-PER-VIEW BUSINESS, IS COMPETITIVE, THEREBY JUSTIFYING SUNSET OF THE EXCLUSIVITY PROHIBITION.

Virtually all commenters agree that the MVPD marketplace has evolved from one where cable operators were typically the only provider in a market to one where *all* U.S. households now have multiple competing MVPD alternatives.¹ In particular, DBS has dramatically changed

¹ See, e.g., American Public Power Ass’n Comments at 1-2 (“APPA Comments”); Braintree Electric Light Department Comments at 2 (“BELD Comments”); Broadband Service Providers Ass’n Comments at 2 (“BSPA Comments”) (describing broadband service providers’ competitive efforts); Competitive Broadband Coalition Comments at 2-4, 9-11 (“CBC Comments”) (providing evidence of competition from DBS, LEC-affiliated competitors, broadband overbuilders, and other members of its coalition); Carolina Broadband Comments at 1-2; Digital Broadcast Corp. Comments at 2 (“DBC Comments”); Everest Midwest Licensee Comments at 1 (“Everest Comments”); Independent Multi-Family Communications Council Comments at 1, 6 (“IMCC Comments”) (describing competition to cable provided by SMATV operators throughout the United States); Joint Comments at 18-20, app. A (describing terrestrial competitors’ success at providing competition to cable in markets throughout the United States); Qwest Comments at 2 (describing its overbuilding and video-over-DSL efforts in thirteen

(footnote continued ...)

the dynamics of the MVPD marketplace,² and “has grown from a mere concept in 1992 into a vigorous competitor today.”³ Notably, EchoStar reports that in two markets where it introduced local broadcast stations to its channel lineup, it experienced 44% and 39% increases in “average weekly subscriber additions, *the vast majority of whom came from cable.*”⁴

Similarly, broadband overbuilders have rapidly constructed their networks in major metropolitan areas and are successfully attracting subscribers to their service.⁵ Indeed, RCN alone has targeted seven of the top ten TV markets “comprising 44% of the U.S. residential communications market.”⁶ And electric utilities,⁷ LEC-affiliated MVPDs,⁸ wireless cable

(... footnote continued)

communities including Phoenix, AZ and Omaha, NE); RCN Comments at 9; Rural Independent Competitive Alliance Comments at 1 (“RICA Comments”); World Satellite Network Comments at 2 (noting that WSNet provides wholesale analog programming and equipment to approximately 1,200 private cable operators, MDU owners, and wireless cable operators serving over 800,000 video subscribers).

² See, e.g., CBC Comments at 12 (noting that “DBS’ national reach and channel line up uniformity makes it an attractive distribution outlet for national and regional video programming services”); National Rural Telecommunications Cooperative Comments at 4, 10 (“NRTC Comments”) (describing DBS as a “potent competitive force to cable”).

³ EchoStar Comments at 2. See also DIRECTV Comments at 6 (noting that DBS providers “have emerged as significant new non-cable platforms from which programmers can launch new services”).

⁴ EchoStar Comments at 7 n.15 (emphasis added). See also iN DEMAND Comments at 5-6 (reporting that “DBS now provides local broadcast signals to over forty-four different cities” serving over “60% of the multichannel households nationwide” and that, according to J.D. Power & Associates, almost 50% of current DBS subscribers are former cable customers).

⁵ See BSPA Comments at ii n.1, 2 (reporting that its members have operations in 24 states and the District of Columbia and that “BSPA members represent one of the best opportunities to satisfy expanding demand for competitive residential broadband services”); Everest Comments at 1-2 (noting that “[i]n the ten and a half months since Everest began providing service [in the Kansas City metropolitan area], it has passed approximately 10,000 homes and acquired nearly 3,000 customers”); Seren Comments at 4, 8 (providing service in California and Minnesota and reporting “over 120 thousand households already under franchise, over 20,000 current subscribers, and more than 1,000 miles of constructed broadband network”).

⁶ RCN Comments at 9-10 (providing service in Boston, New York/New Jersey, Philadelphia, Washington, D.C., San Francisco, Los Angeles, and Chicago).

operators,⁹ and SMATV operators targeting the MDU market¹⁰ unanimously report that they continue to bring increased competition to cable.

The record is also clear that the pay-per-view (“PPV”) business is highly competitive today and will become even more so in the future. iN DEMAND’s comments demonstrated that DBS PPV offerings are considered by many subscribers to be superior to cable PPV services and that there are substantial existing and emerging competitors in the PPV area so that *all* MVPDs, not just DBS operators, have a variety of PPV options to offer their customers.¹¹ No party submitted any argument or evidence to the contrary. Consequently, there is no principled basis for government concern that sunset of the exclusivity prohibition would harm competition or consumers in the PPV area. Quite the contrary. As iN DEMAND showed, the *existence* of the exclusivity prohibition has caused harm to consumers and competition by discouraging iN DEMAND and others from investing in certain programming, thereby reducing program diversity and consumer choice.¹²

(... footnote continued)

⁷ See APPA Comments at 1-2 (noting that as early as the late 1980s, some APPA members offered video service through publicly-owned electric utilities); BELD Comments at 2 (reporting that since it began offering video service in Braintree, MA, in 2000, it serves 3,775 video customers).

⁸ See Joint Comments Exhibit A at 1 (noting that BellSouth Entertainment, LLC “currently holds 20 cable franchises to provide cable service [to] 1.4 million potential cable households”); *id.* at 18-20 (“Data from a variety of sources confirms that the presence of terrestrial competition produces direct and immediate benefits to consumers in the form of lower prices and upgraded and/or more diverse services.”); Qwest Comments at 2 (noting that where Qwest “has entered the MVPD competitive fray with its landline cable service, the consequences have been remarkable”).

⁹ Joint Comments Exhibit A at 2; DBC Comments at 2.

¹⁰ IMCC Comments at 1 (“IMCC members employ a variety of communications technologies . . . to serve the residential multiple dwelling unit (‘MDU’) market, which include some 30 million households.”).

¹¹ See iN DEMAND Comments at 12-14.

¹² See *id.* at 14-15.

Despite this overwhelming record evidence, certain non-cable commenters ask the Commission to decline to sunset the exclusivity prohibition based on cable's market share.¹³ However, this narrow focus on market share is inappropriate. As the courts have stated, "a company's ability to exercise market power depends not only on its share of the market, but also on elasticities of supply and demand, which in turn are determined by the *availability* of competition."¹⁴ The record here is clear that there are well-established alternative providers that constrain cable operators' conduct. Moreover, the contention that competition in the MVPD marketplace will unravel if the exclusivity prohibition sunsets and cable operators sign exclusive contracts with all of the popular programming services is inconsistent with economic reality. As AT&T and others showed in their comments:

Established or even new programmers will not agree to forego a significant portion of their possible audience reach unless they find it profit-maximizing to do so However, it would not be economically rational for any MSO to overpay programmers for exclusives as a means of excluding competing MVPD distributors since these rivals are established, are highly unlikely to exit the market, and are in some cases national distributors, all of which makes recoupment highly unlikely. This holds equally true where the programmer and the MSO are commonly owned, since the profit to the overall enterprise must account for the opportunity cost of not having the programming more widely distributed.¹⁵

¹³ See, e.g., BSPA Comments at 6-7; CBC Comments at 10; Gemini Comments at 3; Qwest Comments at 5; RCN Comments at iii.

¹⁴ See *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (emphasis in original).

¹⁵ AT&T Comments at 23-24. See also Economists Inc., *Competition for Video Programming: Economic Effects of Exclusive Distribution Contracts* 19-22 (Dec. 3, 2001) (attached to Cablevision Comments) (concluding that "cable today simply does not have the economic clout, even if it were monolithic, to engage in profitable foreclosure of its programming to competing media").

In short, the record shows that removal of the exclusivity prohibition for cable operators will simply put all MVPD competitors on equal footing, thereby enhancing competition, program differentiation, and consumer choice.¹⁶

Based on the substantial record demonstrating the highly competitive nature of the MVPD marketplace, it is clear that the purposes for which Congress adopted the exclusivity prohibition have been achieved and the Commission cannot find that maintaining the prohibition is “*necessary* to preserve and protect competition and diversity in the distribution of video programming.”¹⁷ This conclusion is even stronger regarding PPV programming. Accordingly, the Commission should allow the exclusivity prohibition to sunset, if not for all video programming, at least for PPV services.

II. COMMENTERS’ ALLEGATIONS AGAINST iN DEMAND ARE MISLEADING.

Qwest and Everest allege that iN DEMAND has deprived them of programming subject to the program access rules. In both cases, the allegations are misleading. For example, although Qwest alleges that it has been unable to obtain programming content from iN DEMAND for its technical trials of video-on-demand (“VOD”), it is unclear why iN DEMAND would be obligated to provide programming content for technical trials. Similarly, Everest’s allegations that it was denied VOD content ignore the fact that, even at the present time, the scope of such interactive television services are not completely defined (indeed, iN DEMAND signed its first major motion picture licensing agreement for VOD content less than six months

¹⁶ This is particularly true given that the number and diversity of video programming networks has steadily increased since 1992, while the percentage that are affiliated with cable operators has substantially declined, *see* iN DEMAND Comments at 7-8; Comcast Comments at 7, and that non-cable MVPDs currently have access to all or nearly all non-vertically integrated services that are not even subject to the exclusivity prohibition, *see* NCTA Comments at 14-15.

¹⁷ 47 U.S.C. § 548(c)(5) (emphasis added).

ago).¹⁸ Moreover, as iN DEMAND pointed out in its comments and as RCN recently proved in Philadelphia, the VOD services business is competitive because of the presence of several alternative VOD service providers such as TVN and Diva.¹⁹

III. CONCLUSION

For the foregoing reasons, iN DEMAND urges the Commission to allow the exclusivity prohibition to sunset in its entirety. At the very least, the Commission should exempt PPV services from the exclusivity prohibition.

Respectfully submitted,

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¹⁸ iN DEMAND notes that it currently provides its established PPV services to both Qwest and Everest, as well as to numerous other cable and non-cable MVPDs.

¹⁹ See iN DEMAND Comments at 12-13; Matt Stump, *RCN Offers VOD on Comcast's Turf*, Multichannel News, Dec. 24, 2001 (announcing RCN's new VOD service), available at http://www.tvinsite.com/multichannelnews/index.asp?layout=story_stocks&articleid=CA187838&display=archives&title=RCN+Offers+VOD+on+Comcast%26%2339%3Bs+Turf&pubdate=12/24/2001.